No. 16,279

United States Court of Appeals

For the Ninth Circuit

Lillian Hisako Sato and Blanche Masako Sato,

Appellants,

vs.

John Foster Dulles, Secretary of State of the United States,

Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1519.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE.

By their Amended Complaint below, Appellants prayed for a judgment declaring that they were nationals of the United States, and that they did not lose their United States citizenship by reason of having voted in elections held in Japan. They alleged that the District Court had jurisdiction by virtue of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 USCA Section 903, and Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, note to 8 USCA, Section 1101.

The original complaint was filed on November 20, 1956. The pertinent allegations of the Amended Complaint filed June 5, 1958, are:

That Appellant Lillian Hisako Sato was born in Hawaii on August 22, 1928, and Appellant Blanche Masako Sato was born in Hawaii on September 24, 1917; that their parents were Japanese nationals and that, consequently, Appellants were citizens of the United States by birth, and citizens of Japan by descent; that in 1940 their parents took them from Hawaii to Japan for a visit, and that they desired to return to Hawaii as soon after the war as transportation was available, but were unable, until 1955, to defray the expense of returning; that on November 22, 1955, Appellant Lillian, and on March 7, 1956, Appellant Blanche applied to the American Consul in Fukuoka, Japan, for registration or a passport to return to Hawaii; that in response to said applications, the American Consul executed a Certificate of the Loss of Nationality of the United States as to Appellant Lillian on April 30, 1956, and as to Appellant Blanche on August 1, 1956; that both certificates were approved by the Secretary of State and notices thereof were communicated to Appellants thereafter; that the certificate as to Appellant Lillian was based on her voting in the Japanese political elections on April 10, 1946, and the certificate as to Appellant Blanche was based on her voting in such elections on April 23, 1951, April 30, 1951, July 20, 1951, October 1, 1952 and December 20, 1954; that they did so vote but only involuntarily and under pressure, duress and coercion.

The Appellee here moved to dismiss, which dismissal was granted on the ground that the Court lacked jurisdiction of the subject matter. This is an appeal from that order of dismissal, and this Court has jurisdiction of the appeal by virtue of 28 USC, Sections 1291 and 1294(1).

ARGUMENT.

Section 401 of the Nationality Act of 1940 (8 USCA, Section 801) applies to dual nationals as well as those who are nationals of the United States only. No proper grounds of jurisdiction were alleged in that the Amended Complaint contained no allegation that the applications for passports or travel documents had been filed prior to December 24, 1952. The "savings clause," moreover, provides no jurisdictional anchor for Appellants.

I

SECTION 401 OF THE NATIONALITY ACT OF 1940 (8 USCA, SECTION 801) APPLIES TO DUAL NATIONALS AS WELL AS THOSE WHO ARE NATIONALS OF THE UNITED STATES ONLY.

Section 401 of the Nationality Act of 1940 (8 USC, Section 801) in pertinent part provides as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . .
>
> (e) Voting in a political election in a foreign state or participating in an election or

> plebiscite to determine the sovereignty over foreign territory . . . ."[1]

Appellants concede the constitutionality of this provision, citing *Perez v. Brownell,* 356 U.S. 44, but contend that the provision has no application to a dual national, i.e., an American citizen who also has the nationality of the country in which he votes. It is difficult to perceive how there can be any ambiguity read into this provision: "A person who is a national of the United States" can mean just that and cannot be construed to mean persons who are nationals of the United States *only.* Even if there were such ambiguity as to require a court to look to the legislative history, that history itself provides the answer to Appellants' argument. *Perez v. Brownell, supra,* at 52-56, discusses the origin of the expatriation provision involved herein.

In the early 1930s the President established a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor to review the nationality laws of the United States, to recommend revisions, and to codify the nationality laws into one comprehensive statute for submission to Congress. This Cabinet Committee's draft code was an omnibus bill in five chapters. The chapter relating to "Loss of Nationality" provided, among other things, that any citizen should lose his nationality by voting in a foreign political election or plebiscite. In

[1]The same provision is incorporated in Section 349 of the Immigration and Nationality Act of 1952, 8 USC, §1481.

support of this recommendation as an act of expatriation, the committee reported:

> "Taking an active part in political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, *whether or not the person in question has or acquires the nationality of the foreign state.*" (emphasis supplied). Codification of the Nationality Laws of the United States, H.R. Comm. Print Pt. 1, 76th Cong., 1st Sess. V-VII, page 67.

In 1938 the President submitted the Cabinet Committee's draft code and the supporting report to Congress. In due course, Chairman Dickstein introduced the code as H.R. 6127, and it was referred to his committee. In early 1940 extensive hearings were held, during which period Mr. Flournoy, Assistant Legal Advisor to the State Department, said that the provision would be "particularly applicable" to persons of dual nationality; however, a suggestion that the provision be made applicable only to dual nationals was not adopted. Hearings Before the House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. 287 at pp. 132 and 398. Upon the conclusion of the hearings in 1940 a new bill was drawn up and introduced as H.R. 9980. The only changes from the Cabinet Committee draft with respect to the act of expatriation were immaterial as far as this discussion in concerned. The House debated the bill in September 1940. In briefly summarizing the loss of nationality provisions of the bill,

Chairman Dickstein said that "this bill would put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." 86th Cong. Rec. 11944.

II

NO PROPER GROUNDS OF JURISDICTION WERE ALLEGED IN THAT THE AMENDED COMPLAINT CONTAINED NO ALLEGATION THAT THE APPLICATIONS FOR PASSPORTS OR TRAVEL DOCUMENTS HAD BEEN FILED PRIOR TO DECEMBER 24, 1952.

Section 503 of the Nationality Act of 1940 (8 USC, Section 903) provides in pertinent part as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia, or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in Court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic

> or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the Court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the Court that he is not a national of the United States . . ."

This section was repealed by the Immigration and Nationality Act of 1952, effective December 24, 1952, 66 Stat. 166, 8 USCA, Section 1101 et seq. Section 360 (a) of this 1952 act, 8 USCA, Section 1503 (a), authorizes, with certain exceptions, an action for declaratory judgment under the Declaratory Judgment Act by a person claiming citizenship *who is in the United States* and whose claim is denied. Sub-paragraph (b) of this section provides as follows:

> "If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an applica-

tion for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. . . ."

Subsection (c) of this same section provides as follows:

"A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. . . ."

In establishing the new procedure as to such persons outside the United States, and providing that a final exclusion by the Attorney General can be reviewed by the courts in habeas corpus proceedings and not otherwise, Congress clearly intended to take from persons in the position of Appellants the right to bring an action for declaratory judgment. *D'Argento v. Dulles,* DC, DC 1953, 113 Fed. Supp. 933.

In addition to its clarity on the face of the Act of 1952, that intent was unequivocally expressed in the

report of the Senate Committee on the Judiciary Subcommittee, which recommended the passage of the bill:

> "One significant and far-reaching proposal is that which would restrict the right of a person who is denied American nationality by an agency or department of the Government from bringing a declaratory judgment to have his citizenship status determined. Under present law such a person may bring such an action whether he is within the United States or abroad. The bill restricts this privilege to those who are within the United States." Senate Report 1515, 81st Cong., 2nd Sess., p. 810.

That Congress has the power to do this seems beyond cavil. No constitutional rights, including those under the due process clause, are infringed. Furthermore, that the statutory remedy provided by the 1952 enactment may be a harsh departure from the legislative policy that there should be liberal judicial review of administrative action is a matter for Congressional, not judicial, consideration. *D'Argento v. Dulles, supra.*

III

THE "SAVINGS CLAUSE" OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 HAS NO APPLICABILITY HERE.

The "savings clause," Section 405 of the Immigration and Nationality Act of 1952 (8 USCA, Section 1101, note), does not preserve to Appellants the right

to a declaratory judgment. The "savings clause" provides in part that:

> "(a) Nothing contained in this Act [this Chapter] unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act [this Chapter] shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this act [this Chapter] shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [sic] conditions, rights, acts, things, liabilities, obligations, or matters, the statutes or parts of statutes repealed by this Act [this Chapter] are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ."

Appellants are not within those holdings such as *Junso Fujii v. Dulles,* 9 Cir., 224 F.2d 906, where affirmative action had been taken by the plaintiff prior to the repeal of the old act. Cf. *Lew Hsiang v. Brownell,* 7 Cir., 234 F.2d 232; *Yung Jim Teung v. Dulles,* 2 Cir., 229 F.2d 244. Nor can they point to any substantive rights existing at the time the statute creating the rights was repealed. The "rights" are in fact procedural remedies and thus not preserved by the "savings clause." See *Aure v. U.S.,* 9 Cir., 225 F.2d 88, 90.

The first affirmative action taken here was in 1955 and 1956 when Appellants applied for passports or registration. Nothing referred to by the "savings clause" existed as to Appellants at the time the 1952 Act took effect except their "status" or "condition." The only such status or condition of Appellants, however, was their alleged citizenship, and this is not itself "affected." What alone is affected, as to Appellants, is the procedure by which that status or condition is to be determined, and that change is clearly "specifically provided." Such provision is within the power of Congress. *Barber v. Yanish,* 2 Cir., 196 F.2d 53; *Matsuo v. Dulles,* SD Cal., 133 Fed. Supp. 711.

Judicial review, except by habeas corpus (and that not at this stage of the administrative proceedings) being thus expressly precluded by Section 360 of the Immigration and Nationality Act of 1952, the District Court properly dismissed the Amended Complaint for lack of jurisdiction.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
June 12, 1959.

Respectfully submitted,
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